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No. ----------

In The Supreme Court of the United States

OCTOBER TERM, 1983

EVERETT HODGES, III,
Petitioner,

vs.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May 1983

QUESTIONS PRESENTED FOR REVIEW

1. Is there a private cause of action cognizable under Section 503 of the Rehabilitation Act of 1973?

2. May a handicapped individual bring a breach of contract action as a third party beneficiary of a contract or affirmative action plan between an employer and the federal government?

3. If the plaintiff relies on unfair labor representation as a defense to the requirements under the Railway Labor Act, must the union be a named party to the suit?

4. Is the Railway Labor Act applicable in a case where the plaintiff is not a member of a labor union and the action is not based on the collective bargaining agreement?

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In The
Supreme Court of the United States
OCTOBER TERM, 1983

EVERETT HODGES, III,
Petitioner,

vs.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published *Hodges v. Atchison, Topeka & Santa Fe Ry.*, 728 F.2d 414 (10th Cir. 1984). Petitioner did not seek a rehearing.

JURISDICTION

Judgment in accordance with the opinion of the Court of Appeals was entered on February 13, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following portion of the Rehabilitation Act of 1973, 29 U.S.C. §701 *et seq.*, is relevant to this appeal:

> (a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706 (7) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.
>
> (b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.
>
> * * *

29 U.S.C. §793.

29 U.S.C. §794 a (b)

In any action or proceeding to enforce or charge a violation of a provision of this title, the Court in its discretion may allow the prevailing party, other than the United States, a reasonable attorney fee as part of the cost.

The following portion of the Railway Labor Act, 45 U.S.C. §151 *et seq.*, is relevant to this appeal:

Section 3

First. There is established a Board, to be known as the "National Railroad Adjustment Board"...and it is provided—

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

* * *

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

45 U.S.C. §153 First (i), (j) & (m).

STATEMENT OF THE CASE

Petitioner filed suit against the respondent in Oklahoma state court alleging wrongful employment discharge. Specifically, the petitioner alleged breach of contract on the part of the respondent as well as violation of 29 U.S.C. §793 (Section 503 of The Rehabilitation Act of 1973) which prohibits discrimination against handicapped individuals. In August, 1981, the respondent filed with the United States District Court for the Western District of Oklahoma a petition and bond for removal of petitioner's action. The cause was removed to that court.

On January 29, 1982, the respondent moved the district court to grant summary judgment in its favor. The district court granted the motion for summary judgment. The distric court held (1) that any claim based directly or indirectly on Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793, could not be maintained because there exists no private right of action under the statute, and (2) that the court lacked jurisdiction to entertain plaintiff's breach of employment contract by virtue of the Railway Labor Act, 45 U.S.C. §151 *et. seq.* Thereafter, petitioner perfected an appeal to the Tenth Circuit Court of Appeals. On February 13, 1984, the Court of Appeals entered its award affirming the district court's ruling. The petitioner prays to this Court for relief from these judgments.

REASONS FOR GRANTING THE WRIT

I.

THERE IS AN IMPLIED PRIVATE CAUSE OF ACTION UNDER SECTION 503 OF THE REHABILITATION ACT OF 1973.

The issue of whether or not Section 503 of the Rehabilitation Act of 1973 provides a private cause of action has not been addressed by this Court. This question is of great importance both for the millions of handicapped individuals who have waited and labored to see their right to equal treatment established in the law along with the rights of other groups who have been victims of invidious discrimination and also for the jurisprudence of implied

private rights of actions. *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980) (Goldberg, dissenting op 611 F.2d at 1085). Although no court of appeals decision has recognized a private cause of action, several district courts have so ruled. *California Paralyzed Veterans Association v. FCC*, 496 F. Supp. 125 (C.D. Cal. 1980); *Clark v. FELEC Serv. Inc.*, 489 F. Supp. 165 (D. Alaska 1980); *Hart v. County of Alameda*, 485 F. Supp 66 (M.D. Cal. 1979); *Drennon v. Philadelphia General Hospital*, 428 F. Supp. 809 (E.D. Pa. 1977).

This Court has made it clear that courts are to find implied remedies when persuasive evidence of Congressional intent supports them. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677 (1979). The most illuminating legislative history accompanied the passage of the 1978 attorney fees amendment, section 505 29 U.S.C. §794 a (b). Congress enacted section 505 in response to fears that the expense was dissuading handicapped employees from vindicating their rights. The Senate Report accompanying section 505 gives irrefutable evidence that a section 503 private cause of action is one of the tools that Congress expected would be used to vindicate those rights. It proclaims, "(T)he availability of attorney's fees should assist in vindicating private rights of action in...(section) 503 cases..." S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978). Where congressional intent is discernable, the court must give effect to that intent. *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 216 (1962). The Court of Appeals, in the present case, failed to give credence to clear legislative pronouncement, Therefore, the Court of Appeals has so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The Court of Appeals relied on the case of *Rogers v. Frito Lay Inc., supra*. However, the Fifth Circuit's decision fails to consider the importance of the legislative history and has been so criticized. See Note, 79 *Mich. L. Rev.* 1093, 1104–1105. The attorney fees provision constitutes an unimpeachable statement by Congress that it understood section 503 to include an implied private remedy.

The Court of Appeals stressed the theory that the comprehensive remedial scheme dictates against implying another remedy.

However, the Court of Appeals failed to consider that this Court has supplemented an express administrative remedy with an implied judicial remedy, most notably under Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. *Cannon v. University of Chicago, supra,* at 694-703. Therefore, the Court of Appeals has decided a federal qustion in a way which conflicts with applicable decisions of this Court.

The writ should be granted to consider this important issue concerning an implied cause of action.

II.

PETITIONER HAS A COMMON LAW RIGHT TO SUE FOR BREACH OF CONTRACT.

Petitioner submits that, even if §503 does not in itself create a private cause of action, he has a common law right to sue for breach of contract. The respondent has asserted that petitioner's discharge was because petitioner failed to disclose injury to his back or prior employment with the respondent. However, an agent of the respondent told the petitioner not to mention these items. The reason petitioner was told not to mention his prior medical condition was because questions pertaining to this subject are illegal under 29 U.S.C.S. Section 793, 41 CFR, parts 60–250, 70–741. The respondent should be estopped to deny directions given by its own agent. Also, the Court of Appeals failed to find that the petitioner is a third party beneficiary to the respondent's contracts with the United States Government. This theory of recovery has never been addressed by this Court and should be considered in order to determine if handicapped individuals have a right of recovery.

III.

THE RAILWAY LABOR ACT IS NOT THE PLAINTIFF'S EXCLUSIVE REMEDY.

The Court of Appeals concluded that the petitioner could not maintain suit in the district court because he is obligated, under the Railway Labor Act, to seek relief primarily and exclusively

through arbitration. However, since petitioner's action is not based on the collective bargaining agreement such a holding is in error. The petitioner contends that his cause of action arises either under the laws of the State of Oklahoma, as a matter of contract law, or under the Rehabilitation Act of 1973. Thus, the case is distinguishable from *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972) relied on by the Court of Appeals.

Even if the Railway Labor Act was applicable, the petitioner's claim would not be barred. The petitioner states that he was not a member of the union. The petitioner was specifically told he could not bring a grievance. In *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court said an employee shall be excused from having to exhaust his administrative remedies if the employee can show that the union breached its duty of fair representation in processing his claim. A question never before considered by this Court is presented. Must the petitioner, as the Court of Appeals suggests, name the union as a party to the lawsuit in order to claim the exception? Petitioner suggests that there is no such requirement.

The Tenth Circuit Court of Appeals decision not allowing an exception to petitioner appears to conflict with rulings of other circuits. *Kaschak v. Consolidated Rail Corp.*, 707 F.2d 902 (6th Cir. 1983); *Schum v. South Buffalo Railway Co.*, 496 F.2d 328 (2d Cir. 1974). Thus, if the Railway Labor Act is applicable to the petitioner, the Court of Appeals failed to follow the established procedure and grant him an exception. However, petitioner believes that the Act is inapplicable because he never was a member of the union.

The Court is also faced with an issue never before addressed by this Court—Does the Rehabilitation Act of 1973 provide a personal cause of action which supplements remedies available in a collective bargaining agreement. Petitioner believes his case is similar to the action brought by the plaintifff in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000-e, claiming he was a

victim of racial discrimination. This Court held that although the plaintiff had gone through the grievance procedure provided under the collective bargaining agreement and lost, that Title VII indicated that a congressional attempt to allow the plaintifff to pursue independently his rights under Title VII. The court concluded that the statutory scheme provided a personal cause of action which supplemented remedies in a collective bargaining agreement.

Respectfully submitted,

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May 1983

CERTIFICATE OF MAILING

On this 13th day of May, 1984, a true and correct copy of the foregoing was deposited in the United States mail, postage prepaid, and mailed to Ronald Lane and John J. Fleps, 80 East Jackson Boulevard, Chicago, Illinois 60604 and H.D. Binns, Jr., 735 First National Center West, Oklahoma City, Oklahoma 73102.

Everett E. HODGES, III,
Plaintiff-Appellant,

v.

The ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant-Appellee.

No. 82-2112.

United States Court of Appeals,
Tenth Circuit.

Feb. 13, 1984.

SETH, Chief Judge.

This appeal involves the discharge of Everett E. Hodges, III by the Atchison, Topeka and Santa Fe Railway Company. Mr. Hodges was discharged during an initial probationary period because of incorrect statements in his job application. He sued Santa Fe for wrongful discharge asserting that the Rehabilitation Act of 1973 (29 U.S.C. § 793) provides for a private right of action such as he filed. Mr. Hodges appeals from the District Court's summary judgment in favor of Santa Fe.

The District Court found that Mr. Hodges could not maintain his action based directly or indirectly on § 503 of the Rehabilitation Act of 1973 because the statute does not provide for a private right of action. Furthermore, the court held that it lacked jurisdiction to entertain Mr. Hodges' claim insofar as it was based on the Railway Labor Act.

Mr. Hodges argues that a private right of action may be implied from the language of the Rehabilitation Act, which states in part:

> "§ 793. Employment under Federal contracts
>
> "(a) Amount of contracts or subcontracts; provision for employment and advancement of qualified handicapped individuals; regulations

> "Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title . . .
> "Administrative enforcement; complaints; investigations; departmental action
> "(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto."

Whether § 793 creates a private right of action has been considered by several courts of appeal, all of which have concluded that neither the legislative history nor the Act in general support the inference of Congressional intent to create a private right of action. *Meyerson v. State of Arizona*, 709 F.2d 1235, 1238 (9th Cir.1983); *Davis v. United Air Line, Inc.*, 662 F.2d 120, 123–26 (2d Cir.1981); *Simpson v. Reynolds Metals Co., Inc.* 629 F.2d 1226, 1240–43 (7th Cir.1980); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080–84 (5th Cir.1980). As stated in *Rogers:*

> "There is no intimation that every qualified handicapped person has a right to affirmative action in his particular case; what is apparent is that those who control federal contracts have a duty to make and enforce contracts containing the requisite clause. The handicapped may have simply the right to petition those who administer federal contracts to perform their duty."

Mr. Hodges argues that a private cause of action may be implied from the passage of 29 U.S.C. § 794a which permits an

award of attorney's fees to successful litigants under Title V of the Act, which includes § 793(a):

> "In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Section 505(b), 29 U.S.C. § 794a(b).

Mr. Hodges cites remarks made in 1978 by Senator Cranston to show Congressional intent to create a private right of action. The court in *Rogers* said of such statement that it was a commentary and not part of the legislative history. Mr. Hodges argues also that legislative history supports the inference of a private right of action. However, under *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26, an implied right of action is only one of four requirements which must be met in order to imply a remedy. The Court in *Cort* said:

> "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted.' *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 [36 S.Ct. 482, 484, 60 L.Ed. 874] (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e.g.*, *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 460 [94 S.Ct. 690, 694, 38 L.Ed.2d 646] (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e.g.*, *Amtrak*, *supra*; *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 423 [95 S.Ct. 1733, 1740, 44 L.Ed.2d 263] (1975); *Calhoon v. Harvey*, 379 U.S. 134 [85 S.Ct. 292, 13 L.Ed.2d 190] (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based

solely on federal law? See *Wheeldin v. Wheeler*, 373 U.S. 647, 652 [83 S.Ct. 1441, 1445, 10 L.Ed.2d 605] (1963); *cf. J.I. Case Co. v. Borak*, 377 U.S. 426, 434 [84 S.Ct. 1555, 1560, 12 L.Ed.2d 423] (1964); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394–395 [91 S.Ct. 1999, 2003–2004, 29 L.Ed.2d 619] (1971); *id.*, at 400 [91 S.Ct. at 2006] (Harlan, J., concurring in judgment)."

On this point, the comprehensive remedial scheme provided in the statute dictates against implying another remedy. Mr. Hodges does not even address these other factors. We find no implied right or remedy in the statute.

We have considered Mr. Hodges' argument that he is a third-party beneficiary under the provisions in Santa Fe's federal contracts which prohibit discrimination against the handicapped, pursuant to § 503. This is but another aspect of the implied right of action argument. *See Hoopes v. Equifax, Inc.*, 611 F.2d 134, 135 (6th Cir.1979).

Mr. Hodges further contends that the Railway Labor Act does not bar his action because it is based on a common law contract rather than a collective bargaining agreement and because the union's alleged misconduct excuses resort to the National Railroad Adjustment Board.

Section 3 of the Railway Labor Act, 45 U.S.C. § 153, has been interpreted to confer primary and exclusive jurisdiction of railroad employees' labor contract disputes to the National Railroad Adjustment Board and the public law boards. *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95; *Order of Conductors v. Pitney*, 326 U.S. 561, 66 S.Ct. 322, 90 L.Ed. 318. Even though Mr. Hodges alleges breach of an employment agreement and not the collective bargaining agreement itself he is still obliged to seek relief primarily and exclusively through arbitration. *Andrews*, 406 U.S. at 322–24, 92 S.Ct. at 1564–65.

Mr. Hodges asserts that because he was not a union member the collective bargaining agreement cannot control his contract claim. However, Mr. Hodges' employment in the craft governed by the applicable collective bargaining agreement makes him sub-

ject to the terms and conditions of employment obtained in the agreement, and the collective bargaining agent was obliged to represent him. *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 909, 17 L.Ed.2d 842; *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202–04, 65 S.Ct. 226, 231–33, 89 L.Ed. 173. Thus, his union membership is irrelevant to the applicability of the collective bargaining agreement. The existence of a comprehensive federal scheme for the settlement of employer-employee disputes in the railroad industry preempts state law action for wrongful discharge. *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.1978).

Mr. Hodges asserts that because the union breached its duty of fair representation he is excused from pursuing his claim through administrative procedures. This argument is based on the reasoning developed in "hybrid" cases in which the employee sues both the employer and the union because they allegedly combined in some ways to obtain or maintain the discharge. *Richins v. Southern Pacific Co.*, 620 F.2d 761 (10th Cir.1980). In the present case Mr. Hodges neither named the union as defendant nor alleged any collusion between the union and Santa Fe to effect his discharge.

We discussed in *Richins* the proper disposition of a case involving an employer-employee dispute if the union were not named as a defendant:

> "If this suit had been brought against the Railroad only, we would have no difficulty in determining the proper disposition. The dispute between plaintiffs and the Railroad is clearly a 'minor' one—that is, 'between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates or pay, rules, or working conditions.' 45 U.S.C. § 153 First (i). As the Supreme Court has emphatically told us, 'Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts.'"

Thus plaintiff must pursue the administrative remedies.

AFFIRMED.

83-1849

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In The United States District Court for the Western District of Oklahoma

EVERETT E. HODGES, III,
Plaintiff,

vs.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

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August 1982

SUPPLEMENTAL APPENDIX

No. CIV-81-1096-T

In The
United States District Court for the
Western District of Oklahoma

EVERETT HODGES, III,
Plaintiff,

vs.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff Everett E. Hodges, III, initiated this suit against the defendant Atchison, Topeka and Santa Fe Railway Company seeking to recover damages for breach of an employment contract. Plaintiff alleges that the defendant entered into contracts with the U. S. Government which provided, pursuant to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793[1], that the defendant would not discriminate against individuals because they are handicapped. Plaintiff asserts that these contract provisions and defendant's personnel policy statements regarding its handicapped affirmative action practices were incorporated by implication into

[1] 29 U.S.C. § 793 provides in pertinent part as follows:

"(a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(6) of this title..."

plaintiff's individual employment contract with the defendant. These terms and thus, the contract, were breached, plaintiff contends, when the defendant terminated plaintiff's employment because he was a qualified handicapped individual.

Defendant has filed a Motion for Summary Judgment contending that plaintiff's suit may not be premised on Section 503 of the Rehabilitation Act as that section does not create a private cause of action and that under Section 3 of the Railway Labor Act (RLA), 45 U.S.C. §§ 151, et seq.,[2] the National Labor Railroad Readjustment Board has primary and exclusive jurisdiction over plaintiff's breach of employment contract claim. In response, plaintiff argues that Section 503 of the Rehabilitation Act of 1973 impliedly authorizes a private suit for damages in federal court but that if it does not, plaintiff is entitled to recover as a third party beneficiary of the defendant's contracts with the United States. In addition, plaintiff maintains that the affirmative action mandates of Section 503 are required by 41 C.F.R. § 60-741.6(g)(1) to be included within the employer's policy manual which, under Oklahoma law, forms a part of the employee's contract and, if not followed, creates a cause of action for breach of contract. As a final basis for recovery plaintiff asserts that defendant circulated an affirmative action policy statement and consequently should be

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[2] The Railway Labor Act (RLA) sets up mandatory procedures for the resolution of "minor" and "major" disputes. Plaintiff's wrongful discharge claim constitutes a "minor" dispute within the meaning of 45 U.S.C. § 153 First (i). *Andrews v. Louisville & Nashville R. Co.*, 406 U.S 320 (1972). ("The fact that petitioner characterizes his claim as one for 'wrongful discharge' does not save it from the Act's mandatory provisions for the processing of grievances... (t)he very concept of "wrongful discharge" implies some sort of statutory or contractual standard that modifies the traditional common-law rule that a contract of employment is terminable by either party at will. Here it is conceded by all that the only source of petitioner's right not to be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitles him to damages, is the collective-bargaining agreement between the employer and the union." Supra at 323-324); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978), cert. denied, 439 U.S. 930 (1978).

bound by and liable for its failure to abide by the statement's terms.[3]

With respect to defendant's proposition that the RLA provides plaintiff's exclusive remedy, plaintiff maintains that the Act does not bar his Section 503 claim as the exclusive remedy rule does not preclude causes of action brought under other federal statutes. The RLA also does not bar his breach of contract claim, plaintiff contends, because he was not a member of any union and the union's failure to timely inform him of the grievance procedure and to process his grievance relieved him of any obligation he had to submit to arbitration under the Act.

Neither party contends that a genuine issue as to any material fact exists to preclude the entry of summary judgment and, as none is present, summary judgment is appropriate. Fed.R.Civ.P. 56; *Mustang Fuel Corp. v. Youngstown Sheet & Tube*, 561 F.2d 202 (10th Cir. 1977). The Court concludes, having reviewed the authorities relied upon by the parties, the briefs, and the other evidence submitted, that plaintiff may not premise a claim on Section 503 of the Rehabilitation Act and that it lacks subject matter jurisdiction over plaintiff's breach of contract claim. The reasons for the decision follow.

Although some district courts have held that Section 503 of the Rehabilitation Act impliedly authorizes a private cause of action for damages resulting from the discriminatory conduct of federal contractors, e.g. *California Paralyzed Veterans Ass'n. v. F.C.C.*, 496 F. Supp. 125 (C.D. Cal. 1980), all of the Courts of Appeal that have addressed the issue have held that Section 503 does not create a private judicial remedy. *Davis v. United Air Lines, Inc.*, 662 F.2d 120 (2nd Cir. 1981), cert. denied, ____ U.S. ____ (1982); *Simon v. St. Louis County, Mo.*, 656 F.2d 316 (8th Cir. 1981), cert. denied ____ U.S. ____ (1982); *Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226 (7th Cir. 1980); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980), cert. denied, 449 U.S.

[3] This theory of recovery is treated as another variation of plaintiff's breach of contract claim which serves, along with plaintiff's claim based on an alleged violation of Section 503 of the Rehabilitation Act as the bases for plaintiff's suit.

889 (1980); and *Hoopes v. Equifax, Inc.*, 611 F.2d 134 (6th Cir. 1979). In accord with these persuasive decisions, see *Rogers v. Frito-Lay*, supra, for a well-reasoned, exhaustive analysis of the issue, the Court finds that Section 503 does not create a private cause of action and may not serve as the basis for plaintiff's suit. This determination also disposes of plaintiff's third party beneficiary theory as it is, in essence, an indirect, unavailing attempt to predicate the action on Section 503.

To withstand defendant's motion regarding his remaining breach of contract or wrongful discharge claim, plaintiff must establish a justifiable excuse for his failure to follow the arbitration proceedings established by the RLA, which are mandatory under the Supreme Court decision of *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972). Accord *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89 (1978). Plaintiff's argument that he was not a union member and thus not the beneficiary of any collective bargaining agreement is not convincing. The union representing a class or craft of railway employees represents all the employees within the craft or class regardless of their status as union members, and all employees share in the rights secured by the collective bargaining agreement negotiated by the union.[4] *Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. L. & N. R. Co.*, 323 U.S. 192 (1944). Plaintiff's position that the union's failure to timely inform him of the grievance procedure and refusal to process his claim relieved him of the obligation to proceed under the RLA does merit discussion.

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[4] Although plaintiff continually refers to his *unproduced* employment contract with the defendant and certain rights that he alleges arise from it, the terms and conditions of his employment were governed by the collective bargaining agreement covering yardmen. In addition, the remedy available to plaintiff under the Railway Labor Act eliminates plaintiff's Fifth Amendment claim, and his Seventh Amendment jury trial argument has been conclusively rejected by several courts. See *Brotherhood of Railroad Trainmen v. Denver & R. G. W. R. Co.*, 370 F.2d 833 (10th Cir. 1966), cert. denied, 386 U.S. 1018 (1967); *Magnuson v. Burlington Northern, Inc.*, 413 F. Supp. 870 (D. Mont. 1976), aff'd, 576 F.2d 1367 (9th Cir. 1978), cert. denied, 439 U.S. 930 (1978).

The Supreme Court has held that a railroad employee may be permitted to institute a federal suit against his employer and union despite his failure to exhaust fully his contractual remedies if the union acting in concert with the railroad employer breaches its duty of fair representation. *Glover v. St. Louis - S. F. R. Co.*, 393 U.S. 324 (1969). However, the Supreme Court has recognized but not resolved the question of whether the employee may sue the employer in district court or must resort to the Adjustment Board for a remedy when, as in the case before this Court, there are no allegations tying the union and employer together with respect to the union's alleged breach of its fair representation duty. *Czosk v. O'Mara*, 397 U.S. 25 (1970).[5] Defendant contends that malfeasance alone on the union's part, without collusion or conspiracy with the employer, does not confer jurisdiction on the court to entertain plaintiff's contractual claim and defendant also asserts that plaintiff's failure to name the union as a defendant is fatal to his suit.

This jurisdictional issue has been addressed by several courts and was recently presented to the Eighth Circuit in *Raus v. Brotherhood Ry. Carmen of U.S. and Canada*, 663 F.2d 791 (8th Cir. 1981), a case brought by railroad employees against their employer *and* union in which the plaintiffs alleged that the railroad breached the collective bargaining agreement by not permitting the plaintiffs to enter a training program and that the union violated its duty of fair representation by not pursuing their grievance. Relying on *Glover v. St. Louis-S. F. R. Co.*, supra,[6] the Court reasoned that the critical factor in determining whether a district court had jurisdiction over a railroad is whether the suit is essentially an action

[5] Suits by employees against their unions for a breach of the duty of fair representation do not fall under the provisions of the RLA and are not subject to the jurisdiction of the National Railroad Adjustment Board. *Czosek v. O'Mara*, 397 U.S. 25 (1970), *Conley v. Gibson*, 355 U.S. 41 (1957); *Raus v. Brotherhood Ry. Carmen of U.S. and Canada*, 663 F.2d 791 (8th Cir. 1981); *Richins v. Southern Pac. Co.*, 620 F.2d 761 (10th Cir. 1980).

[6] In *Glover* the Supreme Court held that the railroad employees' failure to exhaust their remedies under the collective bargaining agreement, the union constitution, and the Railway Labor Act did not mandate dismis-

between some employees *and* the union and management together, "whether there are well-plead allegations of something like collusion between the railroad and the union denying the employee(s) their rights under the contract and the Railway Labor Act." Supra at 798. Finding the complaint devoid of allegations or facts supporting allegations of collusion between the railroad and union, the Court held that the district court lacked subject matter jurisdiction over the railroad, but not over the plaintiffs' claim against the union. But see *Schum v. South Buffalo v. Railway Co.*, 496 F.2d 328 (2nd Cir. 1974); *Pratt v. United Air Lines, Inc.*, 468 F. Supp. 508 (N.D. Cal. 1978).

Notably, dismissal of the plaintiffs' claim against the railroad in *Raus* did not deprive the plaintiffs of a remedy as they could still maintain an action against the railroad before the Adjustment Board. 663 F.2d at 799 n. 15. To the contrary, it appears, though neither party has specifically addressed the point, that Hodge's claim before the Railroad Readjustment Board is time-barred, as he states in his brief that the attorneys for the union "failed to inform him in a *timely* manner as to the manner in which he could proceed with the filing of a grievance and refused to process his grievance."[7] Plaintiff's brief, page 6. A similar charge was made in *Richens v. Southern Pac. Co.*, 620 F.2d 761 (10th Cir. 1980), cert. denied, 449 U.S. 1110 (1981), a case relied upon by the Eighth Circuit in *Raus* that also dealt with the question of a district

[6] (Continued)
sal of their suit against their employer and union when the complaint alleged the railroad and union representatives had been acting in concert to discriminate against the employees. The language viewed as critical and decisive by the Eighth Circuit was "Moreover, although the employer is made a party to insure complete and meaningful relief, it still remains true that in essence the 'dispute' is one between some employees on the one hand and the union and management together on the other, not one 'between an employee or group of employees and a carrier or carriers.'" *Glover v. St. Louis-S.F.R. Co.*, 393 U.S. 324, 329, (1969).

[7] Even if the union refused to process his grievance plaintiff was not without a remedy as it appears he could have filed a claim on his own or with the assistance of counsel under the Act. Railway Labor Act, Section 153 First (j), 45 U.S.C. § 153 First (j).

court's jurisdiction over a union *and* railroad. The plaintiffs in *Richens* sued their employer, alleging that they were demoted and laid off in violation of the applicable collective bargaining agreement, and also sued their union, alleging it breached its duty of fair representation. Noting that the prayers for relief sought were not so easily separable as to warrant bifurcating the proceeding, that the plaintiffs could not secure full relief if the railroad was not a party as reinstatement with seniority was sought, and that the alleged facts were consistent with a pattern of collusion between the union and railroad, the Court held in that "hybrid"[8] case that jurisdiction existed over both defendants. However, although the court was aware of the plaintiffs' argument that if they were required to take their claims to the Board they could not secure any relief because the union's action prevented their filing of a timely claim, supra at 762 n.2, the Court unequivocally stated:

> "If this suit had been brought against the Railroad only, we would have no difficulty in determining the proper disposition. The dispute between plaintiffs and the Railroad is clearly a 'minor' one—that is, 'between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions.' 45 U.S.C. § 153 First (i). As the Supreme Court has emphatically told us, 'Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts.'" (citations omitted) Supra at 762.

Therefore, plaintiff's failure to join the union as a defendant and failure to allege that the defendant and his union acted in collusion preclude him under *Richens* and *Raus* from bringing suit directly against the defendant, his employer, without first exhaust-

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[8] The case was "hybrid" because it contained a breach of contract claim that usually was within the exclusive jurisdiction of the National Railway Adjustment Board and a breach of the duty of fair representation claim that was within the jurisdiction of the district court. See note 3 supra.

ing his administrative remedies.[9] Accord *Riddle v. TransWorld Airlines, Inc.*, 512 F. Supp. 75 (W.D. Mo. 1981).

Accordingly, the Court having determined that Section 503 of the Rehabilitation Act does not create a private cause of action and may not serve as the basis of plaintiff's suit, and that it lacks subject matter jurisdiction over plaintiff's breach of contract due to plaintiff's failure to follow the arbitration proceedings established by the Railway Labor Act, defendant's Motion for Summary Judgment shall be and is hereby granted.

IT IS SO ORDERED this 9th day of August, 1982.

/s/ Ralph G. Thompson
UNITED STATES DISTRICT JUDGE

Filed Aug. 9, 1982
Herbert T. Hope, Clerk
U.S. District Court
s/By: Irene Higginbotham, Deputy

[9] Though unnecessary to discuss, based on the Court's ruling, it is questionable whether the plaintiff has even stated a colorable claim of breach of the duty of fair representation, as that occurs only when a union's conduct toward a member of the collective bargaining unit is discriminatory, arbitrary, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171 (1967). A union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, *Vaca v. Sipes*, supra, but there must be substantial evidence of fraud, deceitful action or dishonest conduct." *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971). See also *Hoffman v. Lonza, Inc.*, 658 F.2d 519 (7th Cir. 1981).

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No. 83-1849

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

EVERETT HODGES, III,

Petitioner,

VS.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, The Atchison, Topeka and Santa Fe Railway Company (hereinafter "Santa Fe"),[1] respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Tenth Circuit's opinion in this case.

[1] Respondent is a wholly owned subsidiary of Santa Fe Industries, Inc. which is a wholly owned subsidiary of Santa Fe Southern Pacific Corporation. Subsidiaries of respondent which are not wholly owned by it are as follows: Alameda Belt Line, The Oakland Terminal Railway, Oklahoma City Junction Railway Company, St. Joseph Terminal Railroad Company, and Sunset Railway Company.

STATEMENT OF THE CASE

Facts

Petitioner, Everett Hodges, was employed by respondent, Santa Fe, as a yardman in Oklahoma City, Oklahoma. Shortly after petitioner was hired, and before he had completed sixty days of service, *i.e.*, his period of probationary employment, Santa Fe discovered that his application for employment as a yardman and his entrance to service physical examination form had been falsely completed.[2] Petitioner was discharged on this account.

At all times during petitioner's employment with Santa Fe as a yardman, the United Transportation Union ("UTU") was certified as the collective bargaining representative of members of the yardmen's craft on the Santa Fe; throughout this period there remained in effect between Santa Fe and UTU collective bargaining agreements governing the terms and conditions of employment of persons performing service for Santa Fe as yardmen. These agreements explicitly provided a probationary period of employment for new Santa Fe yardmen. Together with similar clauses in collective bargaining agreements covering other railroad crafts, these provisions have routinely served as the basis for decisions to terminate the employment of probationary operating employees. Moreover, the National Railroad Adjustment Board and other Railway Labor Act arbitration boards have many times ruled that these clauses permit the termination of probationary railroad employees with or without cause.

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[2] Petitioner falsified his application by failing to disclose previous employment with Santa Fe and, during his entrance to service physical examination, concealed the fact that he had suffered a serious back injury.

Further, collective bargaining agreements in effect between Santa Fe and UTU concerning yardmen also specifically permit discharge of any yardman (even a non-probationary employee) who has falsified his employment application.

Neither petitioner nor anyone on his behalf ever took steps to initiate or progress a claim based on petitioner's termination to arbitration as provided for under the Railway Labor Act.

Proceedings Below

Two years after he was removed from service as a yardman, petitioner brought this action in Oklahoma state court against Santa Fe alleging wrongful discharge based on the terms of an unidentified employment contract with Santa Fe. Petitioner did not name any union representative as a defendant in the action, did not allege any wrongful conduct on the part of any union, and did not thereafter attempt to amend his pleading to implicate any union.

The essence of petitioner's complaint is that his discharge violated portions of federal contracts entered into by Santa Fe which prohibited employment discrimination against handicapped persons, and which petitioner alleged were incorporated in some employment contract in effect between him and Santa Fe.

Santa Fe filed a petition and bond for removal of this action with the United States District Court for the Western District of Oklahoma; accordingly, the cause was removed to that court.

The facts described *infra* were not in dispute; Santa Fe moved the district court to grant summary judgment in its favor. The district court granted this motion finding that there was no genuine dispute as to any material fact, and

concluding (1) that any claim against Santa Fe based directly or indirectly on Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, could not be maintained because there is no private right of action under that statute, and (2) that the court lacked jurisdiction to entertain plaintiff's breach of employment contract or wrongful discharge claim by virtue of the Railway Labor Act.

Petitioner appealed from the district court's decision to the United States Court of Appeals for the Tenth Circuit. After receiving the parties' briefs and hearing oral argument, the court of appeals affirmed the district court's judgment. In its opinion, reproduced at pp. 9-13 of the petition and published at 728 F.2d 414, the Tenth Circuit reasoned that petitioner's handicap discrimination claim was not cognizable under Section 503 of the Rehabilitation Act because that statute does not create a private right of action. The appellate court also ruled that the National Railroad Adjustment Board had exclusive jurisdiction over his breach of employment contract claim, whether or not petitioner had obtained membership in the union. Finally, the court held that since this action only involved a dispute between the employee and his employer, and the record disclosed no indication of collusion between the employer and union to effect petitioner's discharge, the case was not one in which the court could excuse petitioner's failure to resort to the remedial scheme established by the Railway Labor Act.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Tenth Circuit's Holding That Section 503 Confers No Private Right Of Action Is Consistent With Every Other Court Of Appeals Decision Addressing This Issue And Is In Accord With The Decisions Of This Court.

The Court should note at the outset that the Tenth Circuit's holding regarding Section 503 is consistent with those

reached by the nine other courts of appeals which have ruled on this matter. *See Howard* v. *Uniroyal, Inc.*, 719 F.2d 1552, 1555 n.5 (11th Cir. 1983); *Painter* v. *Horne Brothers, Inc.*, 710 F.2d 143 (4th Cir. 1983); *Beam* v. *Sun Shipbuilding and Dry Dock Co.*, 679 F.2d 1077 (3d Cir. 1982); *Fisher* v. *City of Tucson*, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, U. S. , 103 S. Ct. 178 (1982); *Davis* v. *United Airlines, Inc.*, 662 F.2d 120 (2d Cir. 1981), *cert. denied*, 456 U.S. 965 (1982); *Simon* v. *St. Louis County, Mo.*, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982); *Simpson* v. *Reynolds Metals Co., Inc.*, 629 F.2d 1226 (7th Cir. 1980); *Rogers* v. *Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980); *Hoopes* v. *Equifax, Inc.*, 611 F.2d 134 (6th Cir. 1979).[3]

In any event, even if Section 503's failure to create a private right of action were not so well settled among the circuits, petitioner has cited no reasons for the court to grant certiorari in this instance. This Court has stated clearly that the extent to which implication of a private right of action would be of utility to many or would generally further purposes of the statute is irrelevant to the determination of whether the statute permits private enforcement of its terms in court. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 24 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 576-579 (1979). This Court, instead, has taught unequivocally that no unexpressed private right of action may be recognized in the absence of an indication that Congress intended to create one, *Touche Ross & Co.* v. *Redington, supra* at 576, 578 (1979); the requisite congressional intent is not to be lightly inferred. *Id.* at 578.

The fundamental requisites for implying a private right of action were set forth in *Cort* v. *Ash*, 442 U.S. 66 (1975).

[3] Significantly, the decisions in these circuits have overruled or implicitly rejected all of the district court rulings relied upon by petitioner (p. 5).

Here, the most compelling of the *Cort* factors, *i.e.*, whether the statute's language creates a right inherring in an identified class of individuals or merely imposes some duty, *Cannon* v. *University of Chicago*, 441 U.S. 677, 690 n.13 (1979), militates strongly against the implication of a private right of action. *See Touche Ross & Co.* v. *Redington*, *supra* at 576 (where a statute's language neither confers a right on a specific group nor prohibits any conduct, no private right of action may be implied).[4] The subsequent legislative history upon which petitioner relies falls far short of persuasively demonstrating a congressional intent different from the statute's language, *Transamerica Mortgage Advisors* v. *Lewis*, *supra* at 20.[5] Likewise, Section 503's express provision for an administrative remedial scheme also clearly undermines any inference that Section 503 could be made the basis for a private lawsuit. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra* at 19-20. *See also Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 93-94 (1981). The lower court committed no error in reaching this conclusion.

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[4] The language in Section 503 confers no right and forbids no conduct. It merely imposes a duly on federal agencies engaged in procurement activities to include a particular clause in their contracts with private entities and vests in the Department of Labor a means by which to enforce these contractual terms.

[5] It is noteworthy that petitioner has misquoted the Senate Report's contents upon which he relies (p. 5). Indeed, these remarks made by Senator Cranston during a floor debate contained no express reference to Section 503 whatsover. Instead, they were uttered in reference to all of Title V of the Rehabilitation Act which also includes Section 504, 29 U.S.C. § 794, a provision clearly providing for a private right of action, *see Consolidated Rail Corp.* v. *Darrone*, 465 U.S. , 104 S. Ct. 1248 (1984). Further, since the Senate Report related to an amendment to the Rehabilitation Act which succeeded the original Act's passage by five years, its contents could not be accorded the weight of contemporary legislative history. *Cannon* v. *University of Chicago*, 441 U.S. 677, 686 n.7 (1979).

Petitioner's continuing effort to execute an end run around the requirements of Section 503 by arguing that the appellate court at least should have permitted him to sue as a third party beneficiary to Santa Fe's Section 503 contracts (p. 6) is also unavailing. Petitioner cites no authority supporting this contention and could not. The Tenth Circuit properly recognized that petitioner's theory in this regard could not be reconciled with evident congressional intent to provide in Section 503 for an exclusive administrative enforcement mechanism. The court of appeals' conclusion also was in accord with that reached by all other courts ruling on the question. *See Hoopes* v. *Equifax, Inc.*, 611 F.2d 134, 135 (6th Cir. 1979); *Davis* v. *United Airlines, Inc.*, 33 FEP Cases 1119 (E.D.N.Y. 1983); *Coleman* v. *Noland Co.*, 21 FEP Cases 1248 (W.D. Va. 1980). *See also Howard* v. *Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983).

In short, it is clear that the instant petition is without merit insofar as its contentions regarding Section 503 are concerned.

II. Petitioner's Attempts To Circumvent The Bar To His Breach Of Contract Claim Imposed By The Railway Labor Act Present No Novel Issues And Their Disposition Below Is Not In Conflict With Decisions Of Other Circuits.

Without citing any authority supporting his position, petitioner takes issue with the lower courts' conclusion that his state law breach of contract claim was barred by the Railway Labor Act even though petitioner did not invoke the provisions of any collective bargaining agreements (pp. 6-7). This contention clearly presents no reason for the Court to exercise jurisdiction here. As the Tenth Circuit recognized, the manner in which petitioner framed his complaint could not obviate the collective bargaining agreements' relevance to and impact on the merits of his

contract claim. Indeed, provisions in these agreements explicitly addressed and justified petitioner's termination; these agreements could not be overlooked simply because petitioner chose to ignore them. Therefore, since resolution of plaintiff's breach of contract claim would inevitably involve the interpretation and application of collective bargaining agreements, the appellate court correctly relied upon this Court's decision in *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), in holding the claim was barred by Section 3 of the Railway Labor Act. Moreover, it is clear that the decision below comported with the rulings of other circuits in this respect. *See Minehart* v. *Louisville & Nashville R. Co.*, 731 F.2d 342 (6th Cir. 1984); *Landfried* v. *Terminal Railroad Assoc. of St. Louis*, 721 F.2d 254 (8th Cir. 1983); *Choate* v. *Louisville & Nashville R.*, 715 F.2d 369 (7th Cir. 1983); *Brown* v. *American Airlines, Inc.*, 593 F.2d 652 (5th Cir. 1979); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *de la Rosa Sanchez* v. *Eastern Airlines, Inc.*, 574 F.2d 29 (1st Cir. 1978). Petitioner makes no effort to assert otherwise.[6] This Court has denied certiorari before in a case where a discharged railroad employee attempted to redress his discipline in court by pleading rights founded in state law but was rebuffed based on the Railway Labor Act. *Magnuson* v. *Burlington Northern*, 439 U.S. 930 (1978).

Petitioner's oblique reference to breach of duty of fair representation on his union's part is equally misplaced. The fact remains that he never attempted to sue the union in

[6] In connection with his breach of contract claims, petitioner also posits some theory to the effect that Santa Fe should be stopped from denying certain "directions" made by an agent of Santa Fe to petitioner (p. 6). Santa Fe is compelled to note that the record below contained no indication that any such representations were made to petitioner. In any event, petitioner's argument at most addresses the merits of his contract claim which, as the Tenth Circuit properly held, is barred by the Railway Labor Act.

this action, never mentioned the union in his complaint, never even suggested that any failure to represent him foreclosed his access to the arbitral forum, and never contended that the union and carrier engaged in anything approaching collusion in connection with his termination. Notably, this Court has excused otherwise mandatory resort to arbitration only where the union was a named defendant in the action and it was alleged that the union and carrier together effected the employee's discharge and thus rendered arbitration futile. *Glover* v. *St. Louis San Francisco Ry. Co.*, 393 U.S. 324, 329 (1969).

Further, petitioner's citation to *Kaschak* v. *Consolidated Rail Corp.*, 707 F.2d 902 (6th Cir. 1983), and *Schum* v. *South Buffalo Railway Co.*, 496 F.2d 328 (2d Cir. 1974) (p. 7), does not justify review of the Tenth Circuit's decision here. The results in these cases do not conflict with the holding below. In *Kaschak*, the court went to considerable length to explain that failure to resort to the Adjustment Board would be excused only where it was clearly alleged and proven that plaintiff reasonably relied on his union to present a union agreement grievance, that the union breached its duty of fair representation, and that this breach necessarily foreclosed the employee's access to arbitration. 707 F.2d at 913. Nothing of the sort is involved here. Indeed the record discloses no indication that petitioner relied on the union to process a grievance based on the union agreements and lost his opportunity to do so as a result. On the contrary, petitioner's affidavit indicates at most that the union informed him at the outset that it would not take up his case. At that point, petitioner could have and should have pursued his claim on his own. The union's conduct did not prevent him from doing so.[7] For similar reasons, reference to the

[7] Section 3 First (j) of the Railway Labor Act expressly confers on a railroad employee the right to present his grievances before the Adjustment Board without union representation. 45 U.S.C. § 153 First (j).

Second Circuit's decision in *Schum* v. *South Buffalo Ry. Co.*, 496 F.2d 328 (2d Cir. 1974), also fails to support the petition. There the grievant sought to redress rights based on collective bargaining agreements and sued the union complaining in several counts that it breached its duty of fair representation and in so doing fundamentally prevented him from exercising his arbitral rights under the Railway Labor Act. Not only does the record here fail to contain anything suggesting that the union deceived petitioner or otherwise foreclosed his access to arbitration, but petitioner has not even raised a claim against the union.

Despite his remarks regarding the union's conduct, petitioner reasserts his belief that the Railway Labor Act "is inapplicable because he never was a member of the union" (p. 7).[8] This theory is frivolous. As the record demonstrates beyond cavil, petitioner was employed by an interstate railroad carrier in a craft represented by a union which maintained collective bargaining agreements governing the conditions of employment of all members of this craft, whether they had joined the union or not, *Steele* v. *Louisville & N. R.*, 323 U.S. 192, 202-204 (1944). Thus, plaintiff's membership in a labor organization is wholly immaterial to the impact of the Railway Labor Act in this case.

Finally, petitioner attempts to rely on this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), presumably in support of his belief that the Railway Labor Act could not bar his breach of contract claim. Petitioner is once again mistaken in this respect. In *Alexander* the Court simply held that the availability of an arbitral

[8] Petitioner's contention in this respect is particularly perplexing in juxtaposition with his references to the union here since the union's duty of fair representation derives "wholly from the command of the [Railway Labor] Act." *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 199 (1944).

remedy under a non-rail labor agreement could not foreclose federal court jurisdiction explicitly provided for by a civil rights statute which unequivocally forbids discrimination based on protected status, whether or not involving breach of contract. Nothing like that is evident here. Petitioner's breach of contract claim invokes no separate federal statutory right of action and instead is inextricably intertwined with issues arising under the controlling collective bargaining agreements. Furthermore, the Railway Labor Act dictates the result complained of here, not merely some private agreement to arbitrate disputes as was the case in *Alexander* v. *Gardner-Denver*. Thus, it is clear that this decision is of no benefit to petitioner.

CONCLUSION

For ~~the~~ reasons heretofor stated, the petition for writ of certiorari should be denied.

Respectfully submitted.

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